Supreme Court, U.S.
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No. 02-944

IN THE

Supreme Court of the United States

JACQUELINE WEAVER, Substitute Administrator of The Estate of EVAMAE H. HEARN, Deceased,

Petitioner,

v.

MICHAEL A. HINSHAW, M.D., GENERAL SURGEONS, INC., and REID HOSPITAL & HEALTH CARE SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, FIRST DISTRICT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the petitioner has presented any evidence that the trial court judge acted with an improper, racially-discriminatory motive in re-assigning a late-arriving African-American venire person to the end of the jury pool, rather than begin *voir dire* examination over.

PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

The parties to the proceedings below are listed in the caption. Respondent General Surgeons, Inc. is a privately-held corporation. Respondent Reid Hospital & Health Care Services is a private, non-profit corporation.

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REASONS FOR DENYING THE PETITION

The petition should be denied because it does not meet the Court's criteria for reviewing a case on a writ of certiorari. The petition does not present a novel issue of federal law. On the contrary, the Indiana Court of Appeals rendered the decision challenged by the petitioner in a way that was completely consistent with United States Supreme Court precedent.

The petitioner contends that in the trial of her predecessor Administrator's medical malpractice claim, the trial court committed an equal protection violation by re-assigning a late-arriving African-American venire person to the end of the jury pool. The petitioner argues that the trial judge should have seated the venire person, Ellen Mabry, in her pre-assigned seat and started the court's *voir dire* questioning (which had been going on for approximately 15-35 minutes) over. She further argues that any inconvenience this would have caused the court and the other members of the venire was outweighed by the plaintiff's and Ms. Mabry's interests in having an African-American be eligible for jury service.

All these arguments miss the mark, and the petitioner's equal protection claim fails, because she has not shown that the trial court acted with discriminatory intent when it re-assigned Ms. Mabry. This Court's precedents make it clear that such discriminatory intent must be established for a plaintiff to assert an equal protection claim. The Indiana Court of Appeals correctly found that the petitioner had not met her burden of proof on this point.

The petitioner invokes the principles enunciated in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and related cases in support of her position. In *Batson*, this Court held that during jury selection a state prosecutor could not exercise his peremptory challenges in a racially-discriminatory way in order to exclude people of a racial minority from the jury.

Batson was a criminal case, but its holding has been extended to civil cases. In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991), this Court held that a private litigant may likewise not use peremptory challenges to discriminate against venire persons based on race. The Court found that the government was so involved with the jury selection process that the use of peremptory challenges constituted state action, even though those challenges were exercised by a private party.

The facts of this case differ from those in *Edmonson* in that it is not a party's peremptory challenge that is at issue, but a trial judge's action in administering the jury selection process. For some of the same reasons that were persuasive to the majority in *Edmonson*, however, it is appropriate to apply a *Batson* analysis to this case. The *Edmonson* court noted that the use of peremptory challenges required the participation of the presiding judge, "who beyond all question is a state actor," 500 U.S. at 624, 111 S. Ct. at 2085, 114 L. Ed. 2d at 675. Moreover, if discrimination on racial grounds is improper for a state prosecutor or a private civil litigant, then it certainly is not less so for a state court judge.

Thus, for the purposes of this certiorari petition, the respondent agrees that applying a *Batson* analysis is reasonable. The petitioner nevertheless fails to meet the burden of establishing discriminatory intent that *Batson* imposes.[1]

Under *Batson* and cases applying it, there is a three-step process to assess whether a peremptory challenge was discriminatory. First, the party attacking the challenge (the petitioner here) must establish a *prima facie* case of discriminatory intent. If that is accomplished, the party that made the challenge must offer a race-neutral explanation in the second step of the process. In the third step, the court evaluates the reasonableness and persuasiveness of the explanation and decides whether the peremptory challenge stands as valid or is disallowed as racially-motivated. *Batson*, 476 U.S. at 93-94, 106 S. Ct. at 1721, 90 L. Ed. 2d at 85-86. *Purkett v. Elem*, 514 U.S. 765, 767, 115 S. Ct. 1769, 1771, 131 L. Ed. 2d 834, 839 (1995); *Hernandez v. New York*, 500 U.S. 352, 358-59, 111 S. Ct. 1859, 1865-66, 114 L. Ed. 2d 395, 405 (1991).

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1. Of all the United States Supreme Court decisions cited in the petition, only *Batson* and *Edmonson* are apposite. With three exceptions, all of the rest involve state methods for selecting jury pools and grand juries, and are therefore of little use under the facts of this case. The three others are similarly of little or no help, based on their facts. *Washington* v. *Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976), dealt with an allegedly-discriminatory test that was part of an application for employment in the District of Columbia police department. *McCray v. New York*, 461 U.S. 961, 103 S. Ct. 2438, 77 L. Ed. 2d 1322 (1983), a precursor to *Batson*, was denied certiorari by this Court. *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), was superseded (at least as far as this petition is concerned) by *Batson*.

Within the first step of this process, this Court has also set out a tripartite evaluation method. *Batson* holds that in order for the petitioner here to establish a *prima facie* case of purposeful discrimination, she must show that her predecessor Administrator, the plaintiff in the medical malpractice case below, was a member of a cognizable racial group; that members of his race were removed from the venire; *and that the facts and circumstances generally raise the inference that the removal was racially motivated. Batson*, 476 U.S. at 96, 106 S. Ct. at 1723, 90 L. Ed. 2d at 87-88.

Applying this test, the petitioner fails to establish a *prima facie* case of discriminatory intent. The first of the three elements exists in that the petitioner's predecessor Administrator was African-American. One could quibble that the second element has not been established, in that Ms. Mabry was not "removed" from the venire, but was shifted to the end of the pool when she arrived late, so as to avoid starting the *voir dire* process over. However, thus re-assigning Ms. Mabry did significantly decrease her chances of being selected to this particular jury, so for the purposes of this petition one may assume that the second element is established.

But the petitioner's claim founders on the third element of the test, because the facts and circumstances of Ms. Mabry's re-assignment do not imply a racial bias. The record before the Court makes clear that the trial court judge asked Ms. Mabry to "stand by," re-assigning her to the end of the venire, for no reason other than the fact she had arrived late and had not heard all of the judge's *voir dire* questions. (*See* Petition at pp. 6-7.) These circumstances do not support, or even permit, an inference that the trial judge was motivated by a racial bias. On the contrary, it is clear that the judge was

motivated by a desire to conduct the trial generally, and the *voir dire* process specifically, in an efficient manner.[2]

There is thus an absence of any evidence supporting an inference of racial bias on the part of the trial judge. The petitioner has therefore failed to establish a *prima facie* case of racial discrimination, which should bring this Court's review to an end.

However, even if one presumes *arguendo* that the petitioner has established a *prima facie* case (the first of the three *Batson* steps), she fails to satisfy all three *Batson* steps, as explained below.

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2. When evaluating the "facts and circumstances" of the trial judge's decision in this case, it is worth noting that there are differences between a judge's position and a prosecutor's. First, there is less reason to question a judge's motive in re-assigning a prospective juror than a prosecutor's motive in exercising a peremptory strike. The prosecutor's strike may be presumed to be used to gain what the prosecutor thinks might be an advantage in the case. If race is an element of the case, the strike may rationally be scrutinized to see if it is racially motivated. By contrast, there is no reason to presume that the judge is acting in an attempt to favor either side.

Second, this Court has recognized that it should be deferential to a trial court's factual findings about whether intentional discrimination existed. *See, e.g., Batson*, 476 U.S. at 98-99, 106 S. Ct. at 1724, 90 L. Ed. 2d at 89, nn.21, 22 ("Certainly, this Court may assume that trial judges, in supervising *voir dire* . . . will be alert to identify a prima facie case of purposeful discrimination."). It follows that — especially in situations such as this, where there is no evidence suggesting that the trial judge had an improper bias — there is no reason to scrutinize his decision with heightened suspicion.

The second *Batson* step calls for the party that exercised the peremptory challenge — by analogy, the trial judge in this case — to offer a race-neutral explanation for the challenge. Here, the trial judge was not called upon to give the kind of "explanation" that a prosecutor would in order to justify a peremptory challenge, but in responding to the plaintiff's objection during a bench conference, he clearly gave a race-neutral explanation for his decision to re-assign Ms. Mabry. His remarks are quoted at pp. 6-7 of the petition. He stated that his decision was based on the fact that Ms. Mabry arrived late, missing a portion of his *voir dire* questioning. To place Ms. Mabry in her pre-assigned seat would have required that the *voir dire* proceedings be started over from the beginning, and "[s]ince we're dealing with this many people's lives in selecting a jury, I elected not to do that." (*See* Petition at p. 7.)

This Court's precedent states that the explanation at this second *Batson* stage need not be ultimately persuasive, or even plausible, in order to satisfy the second step and shift the burden of persuasion back to the petitioner. *E.g.*, *Purkett*, *supra*, 514 U.S. at 767-68, 115 S. Ct. at 1771, 131 L. Ed. 2d at 839; *see also Hernandez*, *supra*, 500 U.S. at 360, 111 S. Ct. at 1866, 114 L. Ed. 2d at 406. Here, however, the trial judge's explanation is more than merely plausible or persuasive — it is convincing. He clearly articulated a reason based on timeliness, efficiency, and consideration for the schedules of the venire members who had arrived on time.

In any event, the explanation is indisputably sufficient to satisfy the second *Batson* step and move the analysis to the third step, under which the burden of persuasion shifts back to the petitioner. In the third step, the persuasiveness of

the explanation is evaluated. *Purkett* again provides guidance as to how that evaluation should be conducted. The *Purkett* opinion noted that, under *Batson*, the explanation must be "clear and reasonably specific" and offer "legitimate reasons" for the decision; it must go beyond a mere denial of an improper discriminatory motive; and it must be "related to the particular case to be tried." *Id.*, 514 U.S. at 768-69, 115 S. Ct. at 1771, 131 L. Ed. 2d at 839-40. The trial judge's explanation meets and exceeds all these criteria. The judge did not merely deny a race-based motivation — he explained that his decision was based on the fact that Ms. Mabry had arrived late, after the *voir dire* questioning had already started, and that he did not want to stop the proceedings and start over from the beginning simply because one additional venire person had arrived. This rationale is clear, specific, legitimate, and related to the particular case. It completely refutes any inference of a discriminatory motive. It follows that the petitioner has utterly failed to meet her burden of persuasion that the judge's decision was racially motivated. Simply stated, the judge's reason was race-neutral.

Perhaps mindful of this, the petition avoids taking its analysis completely through the three-step *Batson* process. Instead, it attempts to shift the focus away from motivation or intent (which the petitioner cannot prove) to racially-disparate *impact* by contending that when she was re-assigned Ms. Mabry was the only African-American in the venire. The petitioner also makes the argument that the trial judge's concerns about running jury selection efficiently and avoiding inconvenience to the other potential jurors are "insufficient" reasons for re-assigning a late-arriving venire member.

These arguments miss the point. It is well settled that in a *Batson*-type challenge, "[a]s in any equal protection case," *id.*, 476 U.S. at 93, 106 S. Ct. at 1721, 90 L. Ed. 2d at 85, the standard is discriminatory intent, not disparate impact. *See, e.g., Hernandez*, 500 U.S. at 359-60, 111 S. Ct. at 1866, 114 L. Ed. 2d at 406-07; *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040, 2047, 48 L. Ed. 2d 597, 607 (1976). Thus, whether Ms. Mabry was the sole African-American in the jury pool when she arrived and was re-assigned is not relevant. What is relevant is whether her status as an African-American was the *reason* she was re-assigned. As the record here amply demonstrates, it was not; timeliness was.

Similarly, the petitioner's argument that the judge should have balanced the inconvenience of the other venire members against the plaintiff's and Ms. Mabry's interest in having an African-American as a potential juror is unavailing. This argument is unsupported by any citation to legal authority in the petition, and it is another example of ignoring the pertinent standard — intent — while seeking to substitute another — balancing or weighing interests. There is no legal support for this attempt by the petitioner. Discriminatory intent remains the essential element she must prove, and she has failed to do so.

The Indiana Court of Appeals, in its Memorandum Decision of December 31, 2001 (Petitioner's Appendix pp. 10-22), correctly observed that the petitioner essentially conceded that she could not establish discriminatory intent when she argued that it was the trial court's *concern for convenience* that had the *effect* of excluding the only African-American venire member. (*See* Petitioner's Appendix at pp. 21-22.) Concern for convenience is not an improper

motivation under *Batson*. The effect that the judge's decision had on the racial makeup of the jury is not the issue. Whether the judge had an impermissible, racially-discriminatory intent is the issue, on which the petitioner bears the burden of proof. The record shows that the judge's reasons for his decision were clearly not race-based or discriminatory in intent. The petitioner has failed to meet her burden of proving otherwise.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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